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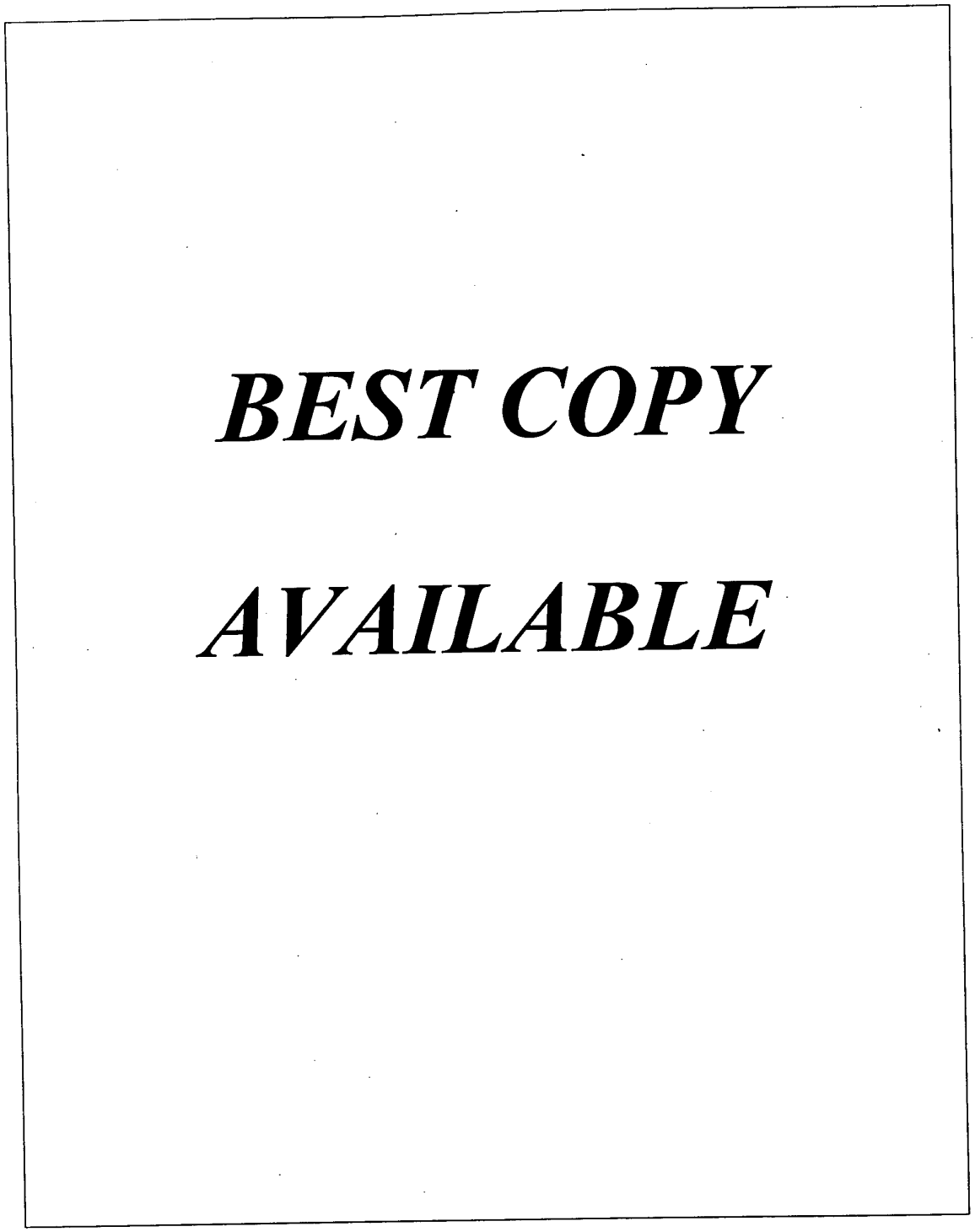
STATEMENT OF SENATOR BIRCH BAYH (D.-Ind.),
CHAIRMAN OF THE
SUBCOMMITTEE ON INTELLIGENCE AND THE RIGHTS OF AMERICANS,
SENATE SELECT COMMITTEE ON INTELLIGENCE

President Carter's Executive order for the Intelligence Community is a significant step toward the enactment of legislation to provide effective and lasting protection against illegal or improper intelligence activities. I believe the new Executive order opens the way for legislative charters strictly limiting intelligence activities that may affect the rights of Americans.

The order improves the standards and procedures protecting Americans against improper intelligence activities. Many of these changes are the result of close consultation between the Administration and the Senate Select Committee on Intelligence. Although the improvements have not yet resolved every problem, they move in the right direction. The joint efforts of the Select Committee and the Administration will go forward to develop effective safeguards in the statutory charters.

The lesson of history is that executive branch reforms are not enough. As long as intelligence operations are limited only by Presidential orders and Attorney General's guidelines, the restrictive policies of one administration can easily be set aside by another. Therefore, I believe that the only sure way to preserve our rights is for Congress to place clear and comprehensive legislative limits on intelligence activities affecting Americans, because executive self-restraint is a fragile safeguard.



The intelligence agencies of the United States are vital to the success of this country's foreign and military policies. But these agencies -- by their very nature -- always will be a potential threat to the rights of Americans, because they operate in secret and they have massive information-gathering capabilities. Fundamental constitutional rights of speech, press, assembly, and privacy are at stake. Unjustified investigation of the lawful political activities of Americans, at home or abroad, infringe first amendment rights. Unreasonable spying on law-abiding Americans using physical surveillance, undercover agents, or access to confidential information violates privacy rights. Electronic surveillance, physical search, and mail-opening in the United States or against Americans abroad must satisfy basic fourth amendment standards.

We must never forget that all these rights have been violated in the past. In the name of collecting "foreign counterintelligence," the CIA mounted its worldwide CHAOS operation to monitor antiwar dissenters and black activists and to compile extensive files on their activities, both at home and abroad. In the search for "foreign intelligence," the CIA randomly opened the mail of Americans to and from the Soviet Union. In response to requests from the FBI, CIA, and military intelligence, the National Security Agency used its massive capabilities to collect, store, and disseminate information about Americans engaged in lawful protest activities. The FBI's

misguided attempts to protect "national security" led to illegal domestic break-ins, wiretaps, mail opening, and the so-called COINTELPRO operations designed to disrupt and discredit the activities of Americans in flagrant violation of the first amendment and due process of law.

Many of the abuses resulted from the vague mandates of these agencies. The scope of their authority was so broad that it provided no real barrier against improper spying on law-abiding Americans.

As the report of the Select Committee chaired by Senator Church pointed out in 1976, the first Executive order on intelligence activities issued by President Ford, failed to provide adequate safeguards against abuse. Its restrictions on collecting information about Americans had broad exceptions for such practices as physical surveillance of Americans abroad who posed an undefined "national security threat." Most restrictions did not apply at all to spying on the overseas activities of law-abiding Americans.

The Attorney General did not have authority under the Ford order to approve the procedures for any covert intelligence-gathering activities in this country by the CIA or the military. Nor was he required to approve procedures for physical surveillance of Americans, for using undercover agents to spy on Americans, for access to confidential private information about Americans, or for the storage and dissemination

of information about Americans. These weaknesses in the Attorney General's role were especially dangerous. The Church Committee saw him as "the most appropriate official to be charged with ensuring that the intelligence agencies of the United States conduct their activities in accordance with the law," and it recommended that he approve all regulations adopted to protect the rights of Americans.

President Carter's Executive order goes far towards remedying each of these deficiencies. The reference to undefined "national security threats" is dropped, and the restrictions apply to spying on the activities of Americans abroad as well as at home. The Attorney General must approve procedures for any covert intelligence collection in this country, and for any other collection, storage, or dissemination of private information about Americans. A new provision bans the use of outside agencies or persons to undertake prohibited activities on behalf of an intelligence agency.

All these changes were strongly urged by the Intelligence Committee in its consultation with the Administration. They are clear improvements. However, the safeguards of an improved Executive order are not a complete model for legislation to protect the rights of Americans.

For example, the order requires that any warrantless search or electronic surveillance directed against an American have

Presidential authorization and the Attorney General's approval based on probable cause that the American is an agent of a foreign power. More detailed court order procedures should replace such Presidential authorization when Congress completes work on the pending Foreign Intelligence Surveillance Act (S. 1566) and on intelligence charter legislation. The Judiciary Committee recently approved S. 1566 and it is now before the Select Committee on Intelligence. The Administration has made a firm commitment to supporting further legislation to close the loopholes for surveillance of Americans abroad and other warrantless searches.

Furthermore, the FBI is not covered in detail by the Executive order restrictions. Detailed standards are needed for FBI counterintelligence investigations of Americans. Under the order, however, the procedures for the FBI are not adequately defined. Charter legislation must establish such procedures for all counterintelligence activities directed at Americans, including FBI investigations and any CIA or military counterintelligence operations which may affect Americans.

An obvious reason for statutory procedures is that the Executive order allows investigations of Americans who are not suspected of committing crimes. "Counterintelligence" investigations cover not only illegal activities, such as espionage or international terrorism, but also nebulous "clandestine intelligence activities" which are not linked to crimes. If

such investigations of law-abiding private citizens are necessary, the standards must be spelled out carefully by law.

A third example of the need to go beyond the Executive order involves spying on Americans to obtain "foreign intelligence." As the order now reads, intelligence agencies can still gather private information about law-abiding American citizens and business firms if the information sought fits the category "foreign intelligence" or if the American is in any way "acting on behalf of a foreign power." This could include interviewing an American's friends and associates without his consent to collect information about his meetings with foreigners, or even using undercover agents to report information about his private dealings with foreigners. Operations aimed at persons "acting on behalf of" foreign powers could include Americans who are asked to speak out publicly in support of a foreign government's interests or who are lawfully registered representatives of foreign governments.

These standards for gathering foreign intelligence about Americans without their consent are still too broad. Charter legislation must specifically address the question of when, if at all, a law-abiding American citizen or business firm can ever be the target of covert foreign intelligence-gathering, either at home or abroad. It must also include standards for handling information about Americans gathered as a by-product of spying on foreigners.

These are examples of a number of problems that have not yet been fully resolved by the Executive order, but must be addressed in charter legislation. Our primary aim should be to establish, by law, that no intelligence agency may conduct covert intelligence operations, at home or abroad, solely to gather information about lawful political activities, beliefs, and associations of Americans protected by the first amendment. There should be a flat prohibition against disseminating any such information about Americans for political or other improper purposes, including the discrediting of any person because he or she has criticized the President, an intelligence agency, or the policies of the government.

Despite these remaining issues, I believe President Carter's Executive order is a prelude to strong safeguards in legislative charters. I look forward to working closely with the Administration in this enterprise because I know we share the belief in the need to place strict legal limits on intelligence activities that may affect the rights of Americans.

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